ENVIRONMENTAL APPEAL BOARD

Annual Report

July 1, 1990 - June 30, 1991

Province of British Columbia

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To: The Honourable Dave Mercier
Minister of Environment

I respectfully submit herewith the annual report of the Environmental Appeal Board for the period July 1, 1990 - June 30, 1991.

Linda Michaluk
Chairman
Environmental Appeal Board

1. INTRODUCTION

This report is the first such document produced by the Environmental Appeal Board, to help promote better understanding of the Board's duties and activities. It addresses decisions rendered by panels of the Board from July 1, 1990, to June 30, 1991. Appeals which were withdrawn are not included.

While the Board has existed as a body since 1982, several new members were appointed on July 1, 1990. The July to June time-frame has been chosen for this report since it best reflects the actions of the new Board.

Section 5 contains information on decisions made by the Board under each act. There is no section for the *Commercial River Rafting Safety Act*, as there were no appeals received under this act during this period. As a matter of interest, the Board has never received an appeal under this act.

This report also contains some very general information about the functions of the Board. For further information, the reader is referred to the specific acts. Questions can also be addressed to:

Environmental Appeal Board
Parliament Buildings
Victoria, British Columbia
V8V 1X5
Telephone 387-3464 Fax 356-9923

Decisions of the Board may be viewed at any of the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- British Columbia Court House Library Society
- West Coast Environmental Law Library

2. THE BOARD

The Environmental Appeal Board was established under the provisions of the *Environment Management Act (1981)*. It is an independent agency whose purpose is to hear appeals from decisions under five statutes administered by the Ministry of Environment, namely: the *Pesticide Control Act*, the *Waste Management Act*, the *Water Act*, the *Wildlife Act* and since 1988 the *Commercial River Rafting Safety Act*. In deciding the appeals, the Board applies the principles of administrative law.

2.1 Administrative Law

The principles of administrative law include the concept of jurisdiction, the rules of natural justice, the rule against bias, fettering of discretion and the limits on a tribunal's efforts to achieve discretion in decision-making.

In other words, the decisions of the Board must be made only after treating all parties to the hearings fairly, and only on the evidence presented at the hearing. Failure to observe the administrative law requirements for fair procedure may result in a court's declaring a decision void, and overturning or sending it back for reconsideration.

2.1 Board Membership

The Board, appointed by the Lieutenant Governor in Council, consists of 21 part-time members, all of whom are outside the public service. The appointments are made by Order in Council and are for a two-year term. The membership of the Board is drawn from across the province and represents diverse business and technical experience.

In 1990, nine members were returned to the Board and 12 new members, including the chairman, were appointed.

The present Board consists of three medical doctors, five lawyers, two professional engineers, two agriculturists, one biochemist, one horticulturist, one registered professional biologist, one teacher and five members with assorted backgrounds and interests in environment and business endeavours. In addition, six members have experience in municipal government.

The Board for the report period consisted of the following members:

Ms. Linda Michaluk (Chairman)	Victoria
Mr. Harry Hunter (V. Chairman)	White Rock
Dr. Olga Barrat	North Vancouver
Ms. Lori Cohen	Vancouver
Ms. Donna Gillis	Vancouver
Ms. Margaret Gregory	Surrey
Mr. Scott Hall	Victoria
Mr. Hugh Hodgkinson	Hudson Hope
Mr. Robert Holtby	Prince George
Ms. Victoria Huntington	Ladner
Ms. Dianne Kerr	Kamloops
Dr. Anthony Larsen	Victoria
Ms. Heather Michel	Burnaby
Mr. Colin Palmer	Powell River
Mr. John Pousette	Terrace
Dr. Marjorie Ryan	Powell River
Mr. Joseph Schaefer	Kamloops
Mr. Roald Skov	Vancouver
Dr. Max Smart	Nanaimo
Dr. John Smith	Vancouver
Mr. Jos Van Hage	Prince George

3. HEARINGS

The Board usually sits in panels of one or three to hear appeals. It is the responsibility of the chairman to structure the panel for each appeal, thus ensuring the required technical expertise is present to properly adjudicate the appeal.

Hearings are held in the community closest to the area affected by the order being appealed against. This is generally the home community of the appellant. While this practice can represent a significant amount of travel for the panel members, it allows the public in the affected area to be involved should they so choose. It also allows the panel to view the area if required.

Oral hearings are conducted unless both parties request to proceed by written appeal. The Board has on occasion ordered that an appeal which has begun as an oral procedure will conclude in writing so that matters may proceed in a timely fashion.

4. APPEAL PROCEDURES

The regulations governing appeals are found in the various acts. Each act has specific regulations regarding appeals. Therefore, the reader is referred to the applicable statutes for specific information.

4.1 Notice of Appeal

In general a prospective appellant presents a Notice of Appeal by registered mail to the Environmental Appeal Board office. This notice should contain the grounds for appeal, the orders sought, the name and mailing address of the responsible party and $25 for each order being appealed. The notice must be filed within the time period specified in the relevant act.

4.2 Timing and Nature of Hearings

Once an appeal has been accepted by the Board, involved parties are identified and notified, and a hearing date is assigned. In most cases, a date is set within 45 days to two months of the appeal being filed. The period can vary depending on the matter under appeal and may be extended at the request of one of the parties to allow sufficient time for preparation.

Because of the quasi-judicial nature of the hearing, the procedure is similar to that of a court. Parties are sworn, evidence is presented and witnesses are cross-examined. All hearings are open to the public.

Decisions are not stated at the conclusion of the hearing. Rather, the written decision follows in about one month. Copies of the decision are mailed to the parties involved, the Minister of Environment, and four libraries.

4.3 Appeals against Decisions of the Environmental Appeal Board

Decisions of the Board are final; therefore the Board may not reconsider or comment on a decision once it is set down. However, section 12 of the Environment Management Act gives the Lieutenant Governor in Council (Cabinet) authority to vary or rescind an order or decision of the Board in the public interest.

Decisions of the Board can also be challenged through an application to the court for a judicial review. The court will examine the matter to determine whether or not the principles of administrative law were followed and will rule accordingly. Generally, the ruling will uphold the decision, or will quash the decision and order the Board to reconsider the matter within certain qualifications.

5. DECISIONS

For the purposes of this report, the decisions have been grouped together according to the act under which appeals were filed.

5.1 Pesticide Control Act

Under section 15 of the *Pesticide Control Act*,

(1) An appeal may be filed by any person with the Board against the action, decision or order of the administrator or of any other person under this act.

(4) On an appeal the board may make an order it considers appropriate . . . .

During the period covered by this report, nine decisions under the *Pesticide Control Act* were rendered. This represented appeals against 23 pesticide use permits, which were filed by 10 groups and two individuals. None of the appellants chose to be represented by legal counsel.

The nine respondents included two provincial ministries (Forests, and Transportation and Highways); one regional district; one Crown corpo-

ration (BC Hydro); and private companies. Only one respondent (Ministry of Transportation and Highways) was represented by legal counsel.

Of the 23 permits appealed, one allowed the application of TORDON to road rights-of-way for knapweed control, two allowed the injection of WOODFUME into hydro poles, and the remainder permitted the application of VISION to logged areas for brush and weed control. All hearings were conducted as oral procedures, although one was concluded by way of written submission.

In six of the nine decisions, the appeals were dismissed but the permits were amended. One decision dismissed the appeal with no permit amendments, but included comments on matters which were outside the panel's jurisdiction. One decision dismissed the appeal with no permit amendments, and one decision allowed the appeal which resulted in cancellation of the permits.

The permit amendments, while tailored to each specific permit, application method and location, usually concerned the following areas:

- public notification
- ministry inspection
- size and location of buffer zones

A common theme running through most appeals was dissatisfaction with the federal pesticide registration system. At present in Canada, a pesticide must be registered by the federal government before it can be used. Agriculture Canada, the federal agency responsible, requires that the active ingredient undergo both chronic and acute toxicity testing; the full formulation must undergo only chronic toxicity testing.

By way of explanation, a pesticide, purchased as a full formulation, consists of the active ingredient, carriers and additives. The active ingredient is that portion of the formulation that actually kills the target species. Carriers and additives are inert ingredients used to make the product easier to apply and more effective. For example, the full formulation forestry pesticide VISION contains glyphosate as the active ingredient and POEA as a surfactant.

Under trade practice legislation, the manufacturer need not disclose the ingredients of the full formulation. This has concerned many members of

the public and has resulted in a call for full ingredient disclosure on the label so the potential for hazard can be more accurately assessed by users and the public.

A common grounds for appeal of most pesticide-use permits was a request for the Environmental Appeal Board to cancel the permit for two reasons:

- the full formulation is not available to the public; and,
- the federal registration process is inadequate.

The courts have ruled that the fact that a federally-registered pesticide has undergone extensive testing must have some probative value and that the Environmental Appeal Board may assume that a federally-registered pesticide is generally safe.

The Board recognizes that because something is generally safe, it is not necessarily safe in all circumstances. Therefore the Board must determine on a permit-by-permit basis whether the use of a pesticide as stipulated in the permit conditions will result in an unreasonable adverse environmental impact. The criteria used by the Board to make such a decision have not yet been been set down for public distribution. This a priority that will be addressed in September 1991.

In late 1990, the *Pesticide Control Act* Regulations were amended by the Ministry of Environment to require that applications for a pesticide-use permit be advertised. Prior to this amendment, pesticide-use permits were advertised only after they had been issued. This left the public with the impression that there was little hope in affecting the permit, as it was often already in effect. This regulation change was recommended by the Environmental Appeal Board so the public could be involved earlier in the process.

5.2 Waste Management Act

Under section 26 of the *Waste Management Act*,

(1) . . . a person who considers himself aggrieved by a decision of

(b) the director or a district director may appeal to the appeal board.

Section 28 defines the powers of the Board under this act as:

> (3) On considering an appeal, the board may
>
> (a) hold a new hearing,
>
> (b) confirm, reverse or vary the decision appealed from, and
>
> (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

In the period covered by this report, two decisions were set down under the *Waste Management Act*. One decision concerned an abatement order and the other concerned an amendment to a municipal waste discharge permit. All proceedings were conducted as oral hearings.

The Waste Management Branch acted as respondent in both appeals. The appellants included a regional district and a mining company. Both parties were represented by legal counsel in one appeal; the other appeal proceeded without counsel.

Both appeals were dismissed with amendments. One amendment extended the date by which terms of the order were to be met. The amendments to the other permit were slightly more complicated as the Board decision made the monitoring conditions stipulated in the permit more strict than the abatement order under appeal.

5.3 Water Act

Under section 9 of the *Water Act*,

> (1) A licensee, riparian owner or applicant for a licence who considers that his rights would be prejudiced by the granting of an application for a licence may . . . file an objection to the granting of the application.

Section 38 further defines the appeal procedure by stating:

(1.1) An appeal lies

(a) to the Environmental Appeal Board from every order of the comptroller, except an order cancelling a licence . .

(5) The appeal tribunal may, on an appeal, determine the matters involved and make any order that to the tribunal appears just, . . .

There were two decisions rendered under the *Water Act*. In each case, the Water Management Branch acted as respondent and private citizens as appellant. Neither appeal involved lawyers during the hearing. Both appeals involved licences regulating the private use of water for domestic purposes and were conducted as oral hearings.

The decisions of the Board dismissed one appeal and upheld the other. As a result of upholding the appeal, a water licence application was rejected.

5.4 Wildlife Act

Under section 103 of the *Wildlife Act*,

(1) Where the regional manager makes a decision that affects

(a) a licence, permit registration of a trapline or guide outfitter's certificate held by a person,

(b) an application by a person for anything referred to in paragraph (a),

the person may appeal the decision of the regional manager to the director.

(3) Where the director

(a) exercises the powers of a regional manager respecting the matters referred to in subsection (1),

(b) makes a decision in an appeal from a decision of a regional manager under subsection (1), or

(c) makes another decision that affects a matter referred to in subsection (1),

the person aggrieved by the decision may appeal the decision of the director to the Environmental Appeal Board.

(5) In an appeal, the Environmental Appeal Board may

(a) dismiss the appeal,

(b) send the matter back to the regional manager or director with directions.

There were nine decisions rendered under the *Wildlife Act*. Of the nine appeals, four concerned hunting licence suspensions and restrictions, two concerned horns which were not released to the hunter, one was against a decision forbidding the use of a plane while wolf hunting, one contested the cancellation of a permit to transport bison, and one concerned angler day quotas. All procedures were conducted as oral hearings, although one concluded through written submissions.

In all cases the Fish and Wildlife Branch was the respondent and private individuals were the appellants. Five of the hearings involved legal counsel on behalf of both parties. In the remaining four, neither party used counsel.

Of the nine decisions, three found that the appeals were to be returned to the branch director with directions. In one of these, the Board found that the director had improperly exercised his discretion. He was directed to take an action prescribed by the Board which was stricter than his original decision.

Another instructed the director to re-examine an issue as a result of new information submitted to the Board which had not been available to the director when the initial decision was made.

In the third decision, the Board noted that a recommendation of a Conservation Officer had not been addressed. The Board instructed the director to revisit the matter and consider adding the prohibition as recommended.

In four decisions in which the appeals were dismissed, the Board made recommendations to the branch on matters outside the Board's jurisdiction. The majority of these recommendations concerned branch policies.

The remaining two appeals were dismissed.

6. SUMMARY

There were 22 decisions rendered during the period covered by this report. All decisions were the result of oral hearings although in two cases a portion of the submissions were made in writing.

Hearings for the appeals were held under the following acts:

Pesticide Control Act	9
Waste Management Act	2
Water Act	2
Wildlife Act	9
Commercial River Rafting Safety Act	0

The nine decisions under the *Pesticide Control Act* included:

- six appeals dismissed; permits amended (10 permits)
- one appeal dismissed with comments (2 permits)
- one appeal dismissed (9 permits)
- one appeal upheld; 2 permits cancelled

The two decisions under the *Waste Management Act* included:

- two appeals dismissed; permits amended

The two decisions under the *Water Act* included:

- one appeal dismissed
- one appeal upheld; water licence application denied

The nine decisions under the *Wildlife Act* included:

- four appeals dismissed with comments
- three appeals returned to director with directions
- two appeals dismissed